

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Accelerating Wireline Broadband Deployment by	)	
Removing Barriers to Infrastructure Investment	)	WC Docket No. 17-84
	)	

**COMMENTS OF THE MINNESOTA TELECOM ALLIANCE**

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## I. INTRODUCTION AND SUMMARY

The Minnesota Telecom Alliance<sup>1</sup> (“MTA”) submits these Comments in this proceeding pursuant to the Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment released by the Federal Communications Commission (“Commission”) on April 21, 2017.<sup>2</sup> The Commission sought comments on a number of proposed actions designed to: (1) remove regulatory barriers to infrastructure investment at the federal, state, and local level; (2) speed the transition from copper networks and legacy services to next-generation networks and services; and (3) reform Commission regulations that increase costs and slow broadband deployment. Among the alternatives under consideration is Commission preemption of state and local laws that may impede broadband deployment. Because preemption could have the unintended consequence of interference with state laws (including Minnesota laws) that support and facilitate broadband deployment, the MTA respectfully recommends a cautious approach to possible preemption.

## II. DISCUSSION

### A. Litigation with Resulting Confusion and Delay May Become Unintended Consequences of Preemption.

The Commission seeks comment on whether it should preempt state and local laws that inhibit broadband deployment.<sup>3</sup> The MTA agrees that easy and timely access to rights-of-way is vital to the development of broadband. However, existing laws in Minnesota facilitate such

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<sup>1</sup> The MTA is a trade association representing the interests of 42 small, medium, and large companies that provide advanced telecommunications services, including voice, data, and video to consumers throughout rural, suburban, and urban Minnesota.

<sup>2</sup> *In re Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84, Further Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment (rel. April 21, 2017) (“NPRM”).

<sup>3</sup> NPRM at ¶ 100.

access, and it would be counterproductive to interfere with the operation of those laws. The MTA is concerned preemption could have the unintended effect of undercutting, procompetitive state statutes and regulations and submits these Comments to explain these concerns.

Historically, states have vigorously resisted any efforts to preempt existing state statutes and regulations, and such resistance often culminates in litigation which may have unanticipated results.<sup>4</sup> For instance, in *Tennessee v. Federal Communications Commission*, Tennessee and North Carolina were recently successful in challenging a Commission order, which preempted state statutes that prohibited municipal expansion of broadband networks beyond the municipal boundaries.<sup>5</sup>

Even when preemption is upheld, it is quite possible that litigation would lead to uncertainty as to whether a particular state or local law was, or was not, within the scope of the preemption, with adverse impacts during the period of uncertainty. Such uncertainty could actually delay the deployment of broadband. Accordingly, caution is appropriate to prevent unintended interference with beneficial state and local laws.

#### **B. Minnesota's Approach Encourages Deployment and Provides an Effective Framework for Resolving Right-of-Way Disputes**

The Commission seeks comment on whether to adopt rules to eliminate excessive delays in negotiation and approval of rights-of-way ("ROW") agreements.<sup>6</sup> The Commission also invites submission of examples of state laws that delay deployment of broadband.

The MTA believes that examples of state laws that delay deployment are important, but respectfully submits that examples of state laws that facilitate broadband deployment are also important for a full and robust record. The MTA respectfully submits that Minnesota's statutory

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<sup>4</sup> See, e.g., *Tennessee v. Fed. Commc'ns Comm'n*, 832 F.3d 597 (6th Cir. 2016).

<sup>5</sup> *Id.*

<sup>6</sup> NPRM at ¶ 103.

and regulatory framework for broadband development strikes the right balance between encouraging broadband development through streamlined regulatory process, as discussed above, and providing financial support for broadband, and letting the market forces facilitate deployment.<sup>7</sup> In the MTA's experience, Minnesota's commitment to nondiscriminatory access to public ROW facilitates access for the placement of infrastructure.

*1. Minnesota law facilitates access to ROWs for deployment of telecommunications services, including broadband.*

The Commission asserts, and the MTA acknowledges, that state and local law can be used to hinder the deployment of critical telecommunications infrastructure.<sup>8</sup> However, it is important to recognize that some states have taken steps to facilitate such access. Minnesota has enacted statutes and implemented regulations that encourage and facilitate the deployment of broadband. The Minnesota Legislature has recognized that "it is in the state's interest that the use and regulation of public rights-of-way be carried on in a fair, efficient, competitively neutral, and substantially uniform manner, ...."<sup>9</sup>

The Minnesota Legislature also took steps to prevent local government units from discriminating in ROW management.<sup>10</sup> In particular, local government units are prohibited from (1) unlawfully discriminating among telecommunications ROW users; (2) granting a preference to any telecommunication ROW user; (3) creating or erecting an unreasonable requirement for entry to the public ROW by telecommunications ROW users; or (4) requiring a

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<sup>7</sup> Minnesota promulgated statutory provisions governing public ROW use by telecommunications providers in 1997, and the MPUC promulgated regulations to implement these statutory provisions in 1998. *See generally*, Minn. Stat. § 237.163.

<sup>8</sup> NPRM at ¶¶ 103-107.

<sup>9</sup> Minn. Stat. § 237.162, subd. 1.

<sup>10</sup> Minn. Stat. § 237.163, subd. 7.

telecommunication right-of-way user to obtain a franchise or pay for the use of the ROW.<sup>11</sup> These Minnesota statutes provide an example of how a state can encourage rather than hinder access to public ROWs, and it is appropriate to take appropriate steps to shield such state statutes from any efforts to preempt state or local laws that interfere with broadband deployment.

It is interesting to note that Minnesota law also addresses the often contentious issue of access to railroad ROWs. For a utility that crosses a railroad ROW, other than a crossing within a public ROW, the utility must pay the railroad a onetime standard crossing fee of \$1,250 for each crossing.<sup>12</sup> The railroad cannot assess any other fee or charge against the utility.<sup>13</sup>

*2. Minnesota law includes a dispute resolution mechanism.*

Minnesota has also established a dispute resolution mechanism administered by the Minnesota Public Utility Commission (“MPUC”) to expeditiously facilitate resolution of any ROW disputes. The MTA believes that such a mechanism serves as an important element to accelerate broadband deployment.

The timely and efficient resolution of disputes related to ROWs is critical to Minnesota’s broadband deployment goals. To further these two objectives, the Minnesota Legislature has

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<sup>11</sup> Minn. Stat. § 237.163, subd. 7: (a) In managing the public rights-of-way and in imposing fees under this section, no local government unit may:

(1) unlawfully discriminate among telecommunications right-of-way users;

(2) grant a preference to any telecommunications right-of-way user;

(3) create or erect any unreasonable requirement for entry to the public rights-of-way by telecommunications right-of-way users; or

(4) require a telecommunications right-of-way user to obtain a franchise or pay for the use of the right-of-way.

<sup>12</sup> Minn. Stat. § 237.045, subd. 6 (a).

<sup>13</sup> *Id.*

given the MPUC the jurisdiction to resolve any complaints regarding a decision or regulation issued by a local government unit that violates a statewide ROW standard.<sup>14</sup>

Similarly, the MPUC has jurisdiction to resolve any ROW disputes involving railroads.<sup>15</sup> The MPUC's oversight ensures that the decisions and regulations issued by local government units comply with the state of Minnesota's statutes and regulations regarding ROW use for broadband development. The MTA urges the Commission to consider a resolution mechanism as a best practice for state legislation.

*3. Minnesota law prohibits local governments from imposing excessive fees and costs*

The Commission seeks comment on “adopting rules prohibiting excessive fees and other costs that may have the effect of prohibiting the provision of telecommunications services.”<sup>16</sup> The Commission seeks comment on other prohibitive state and local laws.<sup>17</sup>

In line with the Minnesota's goal to prevent discrimination that may impede the delivery of telecommunications services (including broadband), Minnesota limits the fees that a local government unit can impose on telecommunications ROW users.<sup>18</sup> Such fees must be (1) based on the actual costs that the local government unit incurs to manage the public ROWs; (2) an allocation among all users of the public ROW, including the local government unit itself, to reflect the proportionate costs imposed on the local government unit by each of the various types of uses of the public ROWs; (3) imposed on a competitively neutral basis; and (4) imposed so

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<sup>14</sup> Minn. Stat. § 237.163, subd. 8 (b): The Public Utilities Commission is authorized to review, upon complaint by an aggrieved telecommunications right-of-way user, a decision or regulation by a local government unit that is alleged to violate a statewide standard.

<sup>15</sup> Minn. Stat. § 237.045, subd. 8 (b): (“[E]ither party may petition the Public Utilities Commission for assistance via mediation or arbitration of the disputed crossing application. The petition must be filed within 60 days of receipt of the objection.”).

<sup>16</sup> NPRM at ¶¶ 104-105.

<sup>17</sup> NPRM at ¶ 108.

<sup>18</sup> Minn. Stat. § 237.163, subd. 6.

aboveground uses of public ROWs do not bear costs incurred by the local government unit to regulate underground uses of public ROWs.<sup>19</sup> In the MTA's experience, expressing explicit expectations for fees and costs makes a significant difference in negotiating access with local government units. The MTA urges the Commission to consider using these provisions of Minnesota law as an example for a reasonable approach to any further rulemaking.

*4. Minnesota actively supports high speed broadband deployment in rural areas.*

Minnesota also actively supports broadband deployment through its Office of Broadband Development ("OBD") and the Border-to-Border Grant Program administered by the OBD.<sup>20</sup> The OBD carries out the goals of the Minnesota Legislature that: (1) all Minnesota businesses and homes have access to high speed broadband with a minimum download speed of at least 25 megabits per second and minimum upload speeds of at least three megabits per second by 2022, and (2) all Minnesota businesses and homes have access to at least one provider of broadband with download speeds of at least 100 megabits per second and upload speeds of at least 20 megabits per second by 2026.<sup>21</sup>

Through this legislative framework for broadband development, Minnesota seeks to be: (1) one of the top five states for broadband speed universally accessible to residents and businesses; (2) one of the top five states for broadband access; and (3) in the top 15 when

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<sup>19</sup> *Id.*

<sup>20</sup> See Office of Broadband Development: <https://mn.gov/deed/programs-services/broadband/>.

<sup>21</sup> Minn. Stat. § 237.012, subd. 1: Universal access and high-speed goal: It is a state goal that:

(1) no later than 2022, all Minnesota businesses and homes have access to high-speed broadband that provides minimum download speeds of at least 25 megabits per second and minimum upload speeds of at least three megabits per second; and

(2) no later than 2026, all Minnesota businesses and homes have access to at least one provider of broadband with download speeds of at least 100 megabits per second and upload speeds of at least 20 megabits per second.

compared to countries globally for broadband penetration.<sup>22</sup> Minnesota's Border-to-Border Broadband Grant Program facilitates these goals by combining grant funding with private investment to expansion of broadband service to areas of Minnesota that are unserved or underserved by providing state resources to new and existing providers to build infrastructure in the unserved and underserved areas of the state. In the 2017 Minnesota legislative session alone, \$20 million was allocated to the Border-to-Border Broadband Grant Program.<sup>23</sup> Minnesota Governor Mark Dayton also appointed a Broadband Task Force to advise him and the legislature regarding ongoing opportunities to improve access to broadband and close the digital divide in Minnesota.<sup>24</sup>

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<sup>22</sup> Minn. Stat. § 237.012, subd. 2: State broadband leadership position. It is a goal of the state that by 2022 and thereafter, the state be in:

(1) the top five states of the United States for broadband speed universally accessible to residents and businesses;

(2) the top five states for broadband access; and

(3) the top 15 when compared to countries globally for broadband penetration.

<sup>23</sup> See Broadband Grant Program, Office of Broadband Development: <https://mn.gov/deed/programs-services/broadband/grant-program/>.

<sup>24</sup> See Governor's Broadband Task Force resources, *available at* <https://mn.gov/deed/programs-services/broadband/task-force/>.

### III. CONCLUSION

The MTA supports efforts to accelerate broadband deployment in rural areas. The foregoing summary of Minnesota's statutory and regulatory scheme governing access to ROWs demonstrates Minnesota's comprehensive and thoughtful approach to broadband development. If the Commission considers preemption of state and local laws, the MTA respectfully requests that the Commission note the existence of successful state laws that facilitate broadband deployment and take appropriate steps to avoid unintended interference with such laws.

Date: June 15, 2017

Respectfully submitted

MINNESOTA TELECOM ALLIANCE

/s/ Brent J. Christensen

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